UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. **Case No. 8:03-CR-77-T-30TBM**

HATEM NAJI FARIZ
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AMENDED MOTION TO DISMISS COUNTS 3, 4, 12-16, and 18-43 AND TO QUASH PARAGRAPH 26(f) OF COUNT ONE OF THE SUPERSEDING INDICTMENT AND MEMORANDUM OF LAW IN SUPPORT

Defendant, Hatem Naji Fariz, by and through undersigned counsel, and pursuant to Federal Rule of Criminal Procedure 12(b)(3), moves this Honorable Court (1) to dismiss Counts 3, 4, 12-16, and 18-43, and (2) to quash Paragraph 26(f) of Count One of the Superseding Indictment (Doc. 636).[1] As grounds in support, Mr. Fariz states:

1. On September 21, 2004, the grand jury returned a Superseding Indictment in the instant case (Doc. 636). The Superseding Indictment realleges against Mr. Fariz charges of conspiring to provide material support to the Palestinian Islamic Jihad ("PIJ"), a designated foreign terrorist organization ("FTO"), in violation of 18 U.S.C. § 2339B (Count Three), and conspiring to violate Executive Order 12947 by making and receiving funds, goods, and services to and for the benefit of specially designated terrorists ("SDT's"), in

[1] Mr. Fariz is also addressing an issue arising in Count Two, Part IV, *infra*, but he is not requesting that Count Two be dismissed in this motion.

violation of 50 U.S.C. § 1701 *et seq*., 31 C.F.R. § 595 *et seq*., and 18 U.S.C. § 371 (Count Four). The Superseding Indictment further reasserts the alleged violation of 18 U.S.C. § 2339B as a part of the pattern of racketeering activity alleged in Count One, Paragraph 26(f). The Superseding Indictment adds as new charges against Mr. Fariz several substantive counts of providing material support or resources to the PIJ (Counts 22-32). Finally, the Superseding Indictment adds money laundering charges, with the FTO and SDT support allegations as the "specified unlawful activity" at issue in those counts (Counts 33-43).

2. Mr. Fariz herein asserts three challenges to these counts in the Superseding Indictment.

3. First, the original Indictment in this case alleged that the Defendants violated 18 U.S.C. § 2339B and Executive Order 12,947 issued by the President under the International Emergency Economic Powers Act ("IEEPA") by conspiring to provide support to a FTO and SDTs. In response to the parties' arguments under the First and Fifth Amendments, made during substantial briefing, oral argument, and a request for reconsideration, this Court interpreted these statutes as requiring that the government must prove that the Defendants had the specific intent to further the unlawful objectives of the FTO or SDT. (Docs. 479 and 593). Mr. Fariz contends that, despite this holding, the Superseding Indictment does not incorporate the *scienter* requirement that this Court found to be constitutionally necessary. The *scienter* requirement is an essential element of the offense charged and must be plead clearly in the indictment. Because the indictment fails to allege this essential element of the material support charges and other charges which rely

on the allegations of material support, Counts 3, 4, 12-16, and 18-43 must be dismissed for failure to state an offense.[2]

4. Second, Counts 3, 4, and 22-43, and Paragraph 26(f) of Count One in the Superseding Indictment each rely on the designation of the PIJ as an FTO and/or of the PIJ and certain individuals as SDT's. Mr. Fariz previously contended that he could not be convicted of crimes based on designations that were obtained in violation of the Due Process Clause of the Fifth Amendment. (Doc. 301). This Court ultimately denied this motion. (Doc. 479 at 34-41). Mr. Fariz reasserts and renews his due process arguments with respect to all allegations in the Superseding Indictment that are based on the designations of PIJ as a FTO and of PIJ, Fathi Shiqaqi, Abd Al Aziz Awda, and Ramadan Abdullah Shallah as SDT's.[3] Because these designations were obtained by unconstitutional statutes and unconstitutional means, Mr. Fariz contends that these designations may not form the basis

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[2] Counts Three and 22 - 32 allege violations of AEDPA. Count Four alleges a violation of IEEPA. Counts 12-16 and 18-21 allege that Mr. Fariz violated the Travel Act, 18 U.S.C. §§ 1952(a)(2) and (3) and 18 U.S.C. § 2. Counts 33-43 allege violations of 18 U.S.C. §1956(a)(2)(A) (money laundering). The money laundering counts depend on allegations that Mr. Fariz transferred money in furtherance of a "specified unlawful activity," namely, providing material support to a foreign terrorist organization under Section 2339B and contributing to a SDT under Section 1705(b). If the material support charges are invalid, the money laundering charges are also invalid. The Travel Act counts depend on the predicate acts of money laundering and extortion. The Travel Act counts are subject to dismissal if both the extortion and money laundering charges are dismissed. Mr. Fariz has requested dismissal of the extortion allegations in a separate motion. Finally, material support is charged as a predicate act in the RICO charges in Count One; this predicate act should be stricken from the superseding indictment if the material support counts are dismissed.

[3] To avoid unnecessary repetition, Mr. Fariz reincorporates by reference his arguments contained in his previously filed motion (Doc. 301), as well as made during the oral argument before this Court on January 21, 2004 (Doc. 461).

of criminal liability against him. Accordingly, Mr. Fariz requests that this Court dismiss Counts 3, 4, and 22 to 43 and quash Paragraph 26(f) of Count One on this basis.

5. Lastly, Mr. Fariz contends that the charges against him in Counts 22-32, alleging that he provided material support or resources to the PIJ by transferring money to the organization, is multiplicitous to the charges against him in Counts 33-43, alleging that he committed money laundering by the same alleged transfer of monies to the PIJ. Accordingly, Mr. Fariz requests that the government be required to choose between these charges to cure this defect in the Superseding Indictment.

MEMORANDUM OF LAW

I. Because the Superseding Indictment Fails to Specifically Plead the Requisite *Scienter* Requirement, this Court Should Dismiss Counts 3, 4, 12-16, and 18-43.

Counts 3, 4, 12-16, and 18-43 of the Superseding Indictment should be dismissed for failure to state an offense. The indictment fails to allege the appropriate criminal intent, a necessary element of the offenses, in violation of Mr. Fariz's Fifth and Sixth Amendment rights, and in violation of Federal Rule of Criminal Procedure 7(c)(1). Mr. Fariz therefore cannot be assured that the grand jury found probable cause to indict him on the specific and necessary elements of the charged crimes. Moreover, because the indictment does not adequately outline an essential element of the offenses, it fails to notify Mr. Fariz of the charges against which he should be prepared to defend.

A. Legal standards.

Mr. Fariz is charged with conspiring to violate and violating 18 U.S.C. § 2339B, passed as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1250 (1996). The relevant part of the statute states that a person who:

> knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and if the death or any person results, shall be imprisoned for any term of years or for life.

18 U.S.C. § 2339B(a)(1). Mr. Fariz is also charged with conspiracy to violate Executive Order 12,947, issued under the authority of the International Emergency Economic Powers Act. Exec. Order No. 12,947, 60 Fed. Reg. 5079 (1995); 50 U.S.C. § 1701(a). Executive Order 12,947 prohibits transactions with an organization or individual who is declared to be a specially designated terrorist. Section 1705(b) of the IEEPA makes it unlawful to willfully violate or attempt to violate any executive order issued pursuant to IEEPA.

The Fifth Amendment to the U.S. Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. The Sixth Amendment guarantees that "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." U.S. Const. amend. VI. The Federal Rules of Criminal Procedure require that the indictment "be a plain, concise, and definite written statement of the essential facts constituting the offense charged . . . ." Fed. R. Crim. P. 7(c)(1).

An indictment is sufficient if it: "'(1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense.'" *United States v. Woodruff*, 296 F.3d 1041, 1046 (11th Cir. 2002) (quoting *United States v. Steele*, 178 F.3d 1230, 1233 - 34 (11th Cir. 1999)); *see also Hamling v. United States*, 418 U.S. 87, 117 (1974). The Supreme Court has indicated that an "indictment not framed to apprise the defendant with reasonable certainty, of the nature of the accusation against him is defective, although it may follow the language of the statute." *United States v. Russell*, 369 U.S. 749, 765 (citations omitted); *United States v. Bobo*, 344 F.3d 1076, 1083 (11th Cir. 2003). The Supreme Court further requires that the statutory language be "accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *Russell*, 369 U.S. at 765.

The Eleventh Circuit has repeatedly found that the *mens rea* element of an offense is an essential element which must be plead in the indictment and proven to the jury. *United States v. Scott*, 993 F.2d 1520, 1521 (11th Cir. 1993) ("'where an act may be either lawful or unlawful . . . the indictment must allege that it was done unlawfully.'") (quoting *Middlebrook v. United States*, 23 F.2d 244, 245 (5th Cir. 1928))[4]; *United States v. Mekjian*,

[4]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.

505 F.2d 1320 (5th Cir. 1975) ("if a defendant is to be assured that he is being called to answer only to a grand jury indictment, is to be protected against double jeopardy, and is to be apprised of the charge he must meet in order to challenge effectively the government's proof, an allegation that the act alleged was done willfully must appear in the indictment."); *see United States v. Fischetti*, 450 F.2d 34 (5th Cir. 1971) (finding that addition of "unlawfully, willfully and knowingly" to the indictment on the day before trial constituted a substantial change in the nature of the offenses charged exceeding the trial court's power to allow an amendment); *see also Morissette v. United States*, 342 U.S. 246, 274 (1952) ("[w]here intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury.").

In addition to providing notice to the defendant, the indictment also serves to ensure that a defendant's Fifth Amendment right to a grand jury is protected. *See Russell*, 369 U.S. at 770 ("To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him."); *Van Liew v. United States*, 321 F.2d 664, 669 (5th Cir. 1963) (indicating that where "the offense is not plainly stated and is made so only by a process of interpretation, there is no assurance that the Grand Jury would have charged such an offense.").

B. The *scienter* requirement is an essential element of the material support charges.

The intent of the Defendants in this case is an essential ingredient of the crimes charged. Indeed, this Court has found that without a specific intent element, the statutes at issue would be unconstitutional. (Docs. 479 and 592). The Court stated that: "it is more consistent with Congress's intent . . . to imply a *mens rea* requirement to the 'material support' element of Section 2339B(a)(1)" and that the government must prove that the defendant "knew (or had specific intent) that the support would further the illegal activities of a FTO." (Doc. 479 at 23 - 24). This Court further found that "a conviction under IEEPA in these circumstances requires similar proof of intent similar to that required under AEDPA." *Id*. at 26. Based on this Court's ruling, the *mens rea* element of these crimes is so essential that it is necessary to maintain the very constitutionality of the statutes.

C. The Superseding Indictment fails to sufficiently allege the essential elements of the offense.

Despite this Court's holding that the *scienter* requirement is constitutionally necessary to these offenses, the *mens rea* element is not specifically plead in the Superseding Indictment. *See* Doc. 636 at 105, 107. Nor, moreover, does the language further detailing the allegations of the offenses adequately describe these essential elements. *Cf. United States v. Gray*, 260 F.3d 1267, 1283 (11th Cir. 2001) (citations omitted) ("[A]n indictment is not defective simply because it fails to allege mens rea so long as the allegation that the crime was committed with the requisite state of mind may be inferred from other allegations in the indictment."). When the statute does not precisely state the essential elements of the offense,

the indictment necessarily must include a statement of facts and circumstances that clearly outlines the specific offense charged. *See Bobo*, 344 F.3d at 1083. The indictment in this case does not contain such express language. On the contrary, the allegations fail to expressly state the *mens rea* element of the offense in a manner that protects Mr. Fariz's constitutional rights, including the right to be charged of a crime by the grand jury.

The Superseding Indictment's reference to the statutes is not sufficient to cure this defect. As the Supreme Court has indicated, "'[i]n an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.'" *Russell*, 369 U.S. at 765 (quoting *United States v. Carll*, 105 U.S. 611, 612 (1881)). In this case, the words of the statute do not expressly set forth the *scienter* requirement. For example, this Court found that "a purely grammatical reading of the plain language of Section 2339B(a) . . . renders odd results and raises serious constitutional concerns." (Doc. 479 at 23). In order to interpret the statute in a manner that preserves its constitutionality, the Court used canons of statutory construction to interpret the statute. *Id*. Mr. Fariz therefore cannot be assured, without an express allegation of the *scienter* requirement, that the grand jury charged him with committing a crime.

D. The defective Superseding Indictment violates Mr. Fariz's Fifth and Sixth Amendment rights.

1. Fifth Amendment

This failure to allege the *scienter* requirement in the Superseding Indictment violates Fariz's Fifth Amendment rights. Mr. Fariz contends that the indictment handed down by the grand jury, on its face, does not ensure that they indicted him of a crime. Because of the ambiguous nature of the Superseding Indictment, it is not clear what was in the minds of the grand jury when they indicted Mr. Fariz. *See Russell*, 369 U.S. at 770. The Superseding Indictment is therefore defective. Even if the Court requires the government to prove the proper *scienter* requirement at trial, and explicitly instructs the jury to that effect, Mr. Fariz is still left with the question of whether the grand jury would have indicted him had the language of the Superseding Indictment accurately stated the constitutionally essential elements of the crimes. This situation presents a clear violation of Mr. Fariz's Fifth Amendment rights.

2. Sixth Amendment

The defective Superseding Indictment also violates Mr. Fariz's Sixth Amendment right "to be informed of the nature and cause of the accusation." U.S. Const. amend. VI. From the language in the indictment, Mr. Fariz cannot be sure of precisely what version of *mens rea* he can expect to defend against at trial. The necessary *scienter* element has been expressly defined by the Court, but that express definition is not reflected in the language of the Superseding Indictment. Despite this Court's ruling, the government continues to take

the position that the statute is constitutional on its face, and does not include the *scienter* requirement.[5] Throughout the course of a six-month trial, the government could easily blur the proper *mens rea* element into nonexistence and confuse the jury if it is not specifically outlined in the indictment. As the Supreme Court emphasizes, "[w]here intent of the accused is an ingredient of the crime charged, its existence is a question of fact." *Morissette*, 342 U.S. at 274. Mr. Fariz must know "*fully, directly, and expressly, without any uncertainty or ambiguity*" the exact nature of the *mens rea* element that the government intends to prove. *Russell*, 369 U.S. at 765 (emphasis added). Mr. Fariz should not be forced to read the Superseding Indictment in the context of the Court's order and hope that the government will do the same.

Accordingly, Mr. Fariz respectfully requests that this Court dismiss Counts 3, 4, 12-16, and 18-43. Alternatively, Mr. Fariz respectfully requests that this Court order that the grand jury transcripts be produced for defense counsel's or the Court's review in order to ensure that the grand jury indicted Mr. Fariz based on a case that presented the proper *mens rea* element that is essential to their finding of probable cause.

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[5] *See Tools to Fight Terrorism Act: Joint Statement of Daniel J. Bryant, Assistant Attorney General, Office of Legal Policy, U.S. Dep't of Justice and Barry Sabin, Chief, Counterterrorism Section, Criminal Division, U.S. Dep't of Justice before the Committee on Senate Judiciary* (September, 13, 2004), available at 2004 WL 84558990 ("The Department [of Justice] believes that the burdensome *scienter* requirements set forth by these courts [referring to this Court's decision in the instant case] are neither compelled by 18 U.S.C. Sec. 2339B nor intended by the Congress . . . The Department believes that the Statute requires only knowledge by the defendant of either the 'foreign terrorist organization' designation, or that the organization engages in terrorist activity.").

II. Designation of PIJ as a FTO and SDT

A. Because the designation of PIJ as a FTO pursuant to 8 U.S.C. § 1189 is unconstitutional facially and as applied, the designation may not form the basis of criminal liability against Mr. Fariz under 18 U.S.C. § 2339B.

A necessary predicate to the prosecution of Mr. Fariz pursuant to 18 U.S.C. § 2339B is the designation of the Palestinian Islamic Jihad as a foreign terrorist organization pursuant to 8 U.S.C. § 1189. In the absence of this designation, there is no federal crime to allege. Mr. Fariz contends that the designation of the PIJ was completed pursuant to a statute, 8 U.S.C. § 1189, that is facially unconstitutional. Mr. Fariz additionally contends that the designation of PIJ was obtained pursuant to 8 U.S.C. § 1189 was unconstitutional as applied, since, according to the government's allegations, the PIJ has had a presence in the United States and therefore has due process rights. Because the designation was obtained pursuant to an unconstitutional statute and by unconstitutional means, the designation of the PIJ cannot form the basis of criminal liability against Mr. Fariz under 18 U.S.C. § 2339B.

1. Section 1189 of Title 8 is facially unconstitutional

As described at length in Mr. Fariz's previous motion, 8 U.S.C. § 1189 on its face provides no predesignation notice to an organization that is designated, and no opportunity for an organization to have access to the materials used against it, to comment on these materials, or to add its own materials to the record. *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 196 (D.C. Cir. 2001). In short, the designation statute, on its face, deprives designated organizations of the opportunity to be heard at a meaningful time and in a meaningful manner. *See id.* at 208-09 (citing, *inter alia*, *Matthews v. Eldridge*

424 U.S. 319, 333 (1976)); *United States v. Rahmani*, 209 F. Supp. 2d 1045, 1055-56 (C.D. Cal. 2002). Mr. Fariz therefore reasserts that Section 1189 is unconstitutional on its face.

2. Section 1189 is unconstitutional as applied to this case

This Court rejected Mr. Fariz's argument (and the *Rahmani* Court's holding) that 8 U.S.C. § 1189 is facially unconstitutional, finding that Section 1189 can be constitutionally applied to organizations who do not have a physical presence or substantial connection to the United States since they are not afforded due process rights. (Doc. 479 at 39-40). Additionally, this Court found that "PIJ had no right to due process under the Constitution because it has no substantial connection to the United States," and therefore denied Mr. Fariz's motion to dismiss. *Id.* at 41. Mr. Fariz contends that the government alleges that the PIJ has had a physical presence in and substantial connection to the United States, and therefore has had due process rights that were violated.

a. The government alleges that PIJ has had a physical presence in the United States

The Superseding Indictment alleges that PIJ members were present in the United States and that PIJ operated within the United States.[6] Specifically, the Superseding Indictment alleges that Dr. Al-Arian was the Secretary of the PIJ "Shura Council," and that

[6] Mr. Fariz does not concede any allegations in the indictment. Instead, at this stage in the proceedings, Mr. Fariz relies on the allegations in the indictment for the purposes of this argument.

Mr. Fariz, an American citizen, was a member of the PIJ. (Doc. 636 at 4 ¶ 6, 5 ¶ 14).[7] In the affidavit in support of search warrants submitted to this Court on February 19, 2003, Agent Kerry L. Myers stated that "investigation revealed that many PIJ leaders presently reside, or once lived in, Tampa, Florida which served as the base of the North American cell of the Palestinian Islamic Jihad-Shiqaqi Faction (PIJ)," and further that "[t]his terrorist cell operated under the direction and leadership of defendant SAMI AL-ARIAN." Affidavit of Kerry L. Myers at 3.[8] The Superseding Indictment claims that the PIJ operated worldwide including in the Middle District of Florida. (Doc. 636 at 8 ¶ 24).

The Superseding Indictment further alleges that PIJ leaders and members were physically present in the United States, had and used offices and residences within the United States for PIJ purposes, and maintained bank accounts within the United States. In particular, the Superseding Indictment alleges that the Palestinian Islamic Jihad-Shiqaqi Faction included the Islamic Concern Project, Inc. ("ICP"), the Muslim Women's Society

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[7] Indeed, in response to Mr. Fariz's due process argument to the original indictment, the government indicated that the charges against Mr. Fariz "stem from the defendant's role as a member of the Palestinian Islamic Jihad ('PIJ') in the United States." (Doc. 345 at 1).

[8] The government further alleges, for example, that it found, among other things, the Manifesto of the PIJ at WISE/ICP in its November 1995 search (Doc. 636 at 75 ¶ 230); that "[t]he FBI received court authority to establish electronic surveillance on the residential telephone lines of defendant AL-ARIAN and defendant SHALLAH, as well as the telephone lines of the cover enterprises WISE and ICP in 1993 and 1994 based on their connections to the PIJ. This electronic surveillance revealed that defendants AL-ARIAN, SHALLAH, and HAMMOUDEH were actively involved in the PIJ, WISE, ICP, and IAF." Exh. A, Affidavit of Kerry Myers at 15; see also *id*. at 32-34 (describing the 1995 search). An excerpt of the search warrant affidavit is attached as Exhibit A.

("MWS"), the World and Islam Studies Enterprise, Inc. ("WISE"), the Islamic Academy of Florida, Inc. ("IAF"), and the American Muslim Care Network ("AMCN") and operated as an "enterprise." (Doc. 636 at 8 ¶ 25). Each of these organizations is alleged to have had a physical presence and substantial connection to the United States. Specifically, each of these organizations is or was incorporated in either Florida or Illinois and/or were located in these states. *Id.* at 5-6 ¶ 16 (ICP a corporation established in Florida); *id.* (MWS a subsidiary organization to ICP); *id*. at 6 ¶ 17 (WISE a corporation established in Florida); *id.* at 6 ¶ 18 (IAF a school located in Florida); *id.* at 7 ¶ 19 (AMCN a non-profit Illinois corporation). Additionally, the Superseding Indictment alleges that ICP, MWS, and WISE maintained bank accounts in Florida, with authorized signatures including Dr. Al-Arian. *Id.* at 6 ¶¶ 16-17. In summary, the Superseding Indictment alleges that "[t]he members of the conspiracy would and did use the WISE, ICP, and IAF offices as the North American base of support for the PIJ and to raise funds and provide support for the PIJ and their operatives in the Middle East . . . ." *Id.* at 105 ¶ 3(a).

The government cannot equate these individuals and offices with the PIJ enterprise within the United States and simultaneously claim that the PIJ did not have a physical presence in or substantial connection to the United States. *See National Council of Resistance of Iran*, 251 F.3d at 202 (finding that once government equated NCRI with PMOI, and NCRI was present in the United States, government could not claim that PMOI was not present in the United States). At a minimum, the government is claiming that ICP, WISE, MWS, IAF, and AMCN had a physical presence, and that PIJ operated out of and through

these offices. According to the governments's allegations, the PIJ has had a substantial physical presence in the United States. *Id.*

b. Section 1189 is therefore unconstitutional as applied to the PIJ

Where an organization has a physical presence in and substantial connection to the United States, it has due process rights. As such, the designation of the PIJ pursuant to 8 U.S.C. § 1189 is unconstitutional, since the PIJ was not provided notice and a meaningful opportunity to be heard prior to its designation. *See National Council of Resistance of Iran*, 251 F.3d at 196; *Rahmani*, 209 F. Supp. 2d at 1056 n.14; *see also Veterans of the Abraham Lincoln Brigade v. Attorney General*, 470 F.2d 441, 444-45 (D.C. Cir. 1972) (discussing opinions filed in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951), regarding due process requirements prior to Attorney General's designation of organizations as Communist).

Moreover, the statute itself is unconstitutional as applied to an organization with a physical presence in the United States. By its own terms, the statute forecloses notice and an opportunity to be heard by the prospective foreign terrorist organization. Notice of a pending designation is only provided, by classified communication, to certain members of Congress seven days prior to the designation. 8 U.S.C. § 1189(a)(2)(i). The first notice that the organization receives is when its designation is published in the Federal Register. *Id.* § 1189(a)(2)(ii). The record is created by the Secretary and may consist of classified information. *Id.* § 1189(a)(3). As the D.C. Circuit has observed, "[n]othing in the statute forbids the use of 'third hand accounts, press stories, material on the Internet or other hearsay

regarding the organization's activities . . . .'" *National Council of Resistance of Iran*, 251 F.3d at 196 (citations omitted). There is no provision in the statute for an organization to review, comment on, or add to the record. *Id*. The judicial review provided of the designation, by the D.C. Circuit's own characterization, is "quite limited." *Id*. When the D.C. Circuit reviewed the designation of the National Council of Resistance of Iran, the court found that while the Secretary had complied with the statute, the designation violated the due process rights of the organization. *Id.*

Section 1189's specificity regarding the lack of notice and opportunity to be heard means that a court or agency cannot "save" the statute by reading into the statute a notice-and-hearing requirement. As the Supreme Court has indicated,

> It must be remembered that '(a)lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute * * *' or judicially rewriting it. . . . To put the matter another way, this Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects.

Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964). An examination of 8 U.S.C. § 1189 reveals that "[t]he clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting." *Id.*; *Rahmani*, 209 F. Supp. 2d at 1057. Congress has shown in other statutes that it knows how to include a notice-and-hearing requirement for agency rule-making and adjudications, *see, e.g.,* the Administrative Procedure Act, 5 U.S.C. §§ 553-554, and the fact

that these notice and hearing requirements are not present in 8 U.S.C. § 1189 demonstrates that Congress intended to omit these requirements. Finally, it would be inappropriate to interpret a notice-and-hearing requirement into the statute only for those organizations that have a physical presence in the United States, where there is no such distinction mentioned in the statute.

The Eleventh Circuit has reached a similar conclusion when examining a statute to determine whether an agency can itself "save" a statute by voluntarily providing the process that is due. In *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236, *reh' g and reh' g en banc denied*, __ F.3d __ (11th Cir. 2003), *available at* 2003 WL 22240519, *cert. denied*, 124 S. Ct. 2096 (2004), the Eleventh Circuit examined the Environmental Protection Agency's ("EPA") authority to issue an administrative compliance order ("ACO"), requiring a regulated party to comply with certain requirements based on a "finding" that the party is currently in violation of the Clean Air Act ("CAA"). *Id.* at 1239-41. The Eleventh Circuit found that ACO's were issued "without any sort of adjudication that a party violated the CAA," and that "the decision to issue an ACO is made 'on the basis of any information available to the Administrator . . . [t]hat is, the Administrator need only have a staff report, newspaper clipping, anonymous phone tip, or anything else that would constitute 'any information.'" *Id.* at 1241. The Eleventh Circuit held:

> Confronted with this patent violation of the Due Process Clause, the EPA might be inclined to respond that it can always "save" the statute by voluntarily undertaking an adjudication prior to the issuance of an ACO. This is a fallacious argument, because the statute clearly establishes a scheme in

> which the decision to issue an ACO, like the decision to file a civil suit in district court, is made not after a full-blown adjudication of whether a CAA violation has been committed, but rather on the "basis of any information available to the Administrator." This is not an area in which the organic statute has set a vague standard, and there is simply no room for administrative discretion on this point. The EPA cannot, in short, amend the statute.

Id. at 1258-59.

Similarly, the Secretary of State cannot "save" Section 1189 by voluntarily providing notice and an opportunity to be heard to prospective FTOs. Accordingly, Section 1189 is unconstitutional when applied to organizations with a presence in the United States. In this case, Section 1189 is unconstitutional as applied to the PIJ.

3. Mr. Fariz properly brings this challenge in this case

Mr. Fariz appears before this Court as a criminal defendant, accused of conspiring to provide and providing material support to the PIJ, in violation of 18 U.S.C. § 2339B. A necessary predicate to this prosecution is the designation of the PIJ as a FTO. Without the designation, there simply is no crime to allege under Section 2339B. Additionally, where the designation is constitutionally invalid, the designation cannot be used as a basis for criminal liability under 18 U.S.C. § 2339B, a proposition that the government has apparently conceded in another case. *See Rahmani*, 209 F. Supp. 2d at 1053 ("The government avers that if the D.C. Circuit or the Supreme Court struck down Section 1189 as unconstitutional defendants would then be entitled to raise this defense in the instant motion to dismiss.").

This Court has previously agreed that Section 1189(a)(8) – preventing a criminal defendant from "rais[ing] any question concerning the validity of the issuance of such designation as a defense or objection at any trial or hearing" – does not foreclose a criminal defendant's ability to challenge the constitutionality of the designation statute. (Doc. 479 at 29-30). Rather, Mr. Fariz may challenge the constitutionality of 8 U.S.C. § 1189, as he does by this motion. *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Johnson v. Robison*, 415 U.S. 361, 365-74 & n.5 (1974).

In this respect, Mr. Fariz is asserting his right to be tried only for a crime whose essential elements are constitutional. Mr. Fariz therefore is asserting his own rights, not the rights of a third-party. Indeed, by challenging Section 1189, Mr. Fariz is not asking the Court to rescind or revoke the PIJ's designations, but to prohibit a prosecution based on an unconstitutional designation. From this perspective, Mr. Fariz meets each of the tests for standing, were he required to meet this standard in this circumstance. Constitutional standing requires that (1) the individual will or has suffered an injury, (2) that is fairly traceable to the actions of the other party, and (3) that a favorable federal decision is likely to redress that injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983).

First, Mr. Fariz has suffered or will suffer an injury by being subjected to criminal prosecution based on an unconstitutional designation of the PIJ. *See Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185, 1194-98 (C.D. Cal. 2004) (finding standing over

constitutional challenges to material support statute based on fear of prosecution for providing "expert advice or assistance"); *see also* Erwin Chemerinsky, Federal Jurisdiction (4th ed. 2003) (indicating that the Supreme Court has found standing for those facing possible criminal prosecution, citing Laurence Tribe, American Constitutional Law 115 (2d ed. 1988) ("A person subject to criminal prosecution, or faced with imminent prospect, has clearly established the requisite 'injury in fact' to oppose such prosecution by asserting any relevant constitutional or federal rights.")).

Second, this injury is fairly traceable to the conduct of the government. In denying the PIJ its due process in the designation process and then attempting to use this designation in the instant prosecution, the injury is traceable to the conduct of the government. Lastly, the requested relief – dismissal of those counts in the Superseding Indictment dependent on an unconstitutional designation of PIJ under Section 1189 – would redress this injury.

That Mr. Fariz should be permitted to challenge the constitutionality of the designation statute is reinforced additionally by the possibility that while the government contends that Mr. Fariz is a member of the PIJ, he in fact is not. Indeed, Mr. Fariz is presumed innocent of the charges against him. In such a situation, Mr. Fariz would not have had notice that the government believed that he was a member until he was prosecuted. Mr. Fariz therefore would not have had any reason to challenge the designation of the PIJ prior to this case. *Cf. Lewis v. United States*, 445 U.S. 55 (1980) (criminal defendant accused of being a felon in possession of a firearm could have sought to restore his civil rights or

challenge his prior conviction in the state courts before possessing a firearm again, and therefore had another avenue available to him); *Yakus v. United States*, 321 U.S. 414, 418 (1944) (wholesalers of beef must challenge maximum prices set by regulation in a forum other than criminal prosecution). Moreover, Section 1189 forecloses challenges by individuals, providing only that the organizations themselves may challenge the designations. 8 U.S.C. § 1189(b)(1). Mr. Fariz's rights to a fair trial and due process should not depend on someone else, namely the PIJ, challenging its designation. Neither Section 1189(b)(1) nor Section 1189(a)(8), however, forecloses constitutional challenges to the designation *statute* in this case.

Mr. Fariz must therefore be given the opportunity to challenge the constitutionality of one of the essential predicates to this prosecution. As such, Mr. Fariz contends that the designation of the PIJ, under these circumstances, cannot be used to form the basis of criminal liability against him under 18 U.S.C. § 2339B. This Court should therefore dismiss Counts 3 and 22-43, and quash Paragraph 26(f) of Count One, each of which rely on the designation of the PIJ as a FTO.

B. Because the designation of PIJ as a SDT pursuant to Executive Order 12,947 violated the due process rights of the PIJ, this designation may not form the basis of criminal liability against Mr. Fariz.

Count Four alleges that Mr. Fariz conspired to willfully violate Executive Order 12,947 by making and receiving contributions of funds, goods, and services to or for the benefit of the PIJ. In Executive Order 12,947, President Clinton designated the PIJ as a

terrorist organization, pursuant to his authority under the IEEPA. Executive Order 12,947, Annex, 60 Fed. Reg. at 5081. Pursuant to Executive Order 12,947, the Department of Treasury designated the PIJ as a SDT. (Doc. 636 at 115-116 ¶7). Where these designations were effectuated without predesignation notice and an opportunity to be heard to the PIJ, these designations violate the Due Process Clause of the Fifth Amendment.

As detailed above, the government claims that the PIJ has had a physical presence in and substantial connection to the United States.[9] Accordingly, the PIJ has due process rights that were also violated in the President's designation of it in the Executive Order. *See Holy Land Found. v. Ashcroft*, 333 F.3d 156, 163-64 (D.C. Cir. 2003) (finding that due process rights applied to designation under IEEPA and that while initial designation may not have comported with due process, subsequent designation in which notice and opportunity to be heard were provided satisfied due process requirements); *see also Veterans of the Abraham Lincoln Brigade*, 470 F.2d at 444-45 (citing *Joint Anti-Fascist Refugee Committee*).

Mr. Fariz therefore challenges the constitutionality of the PIJ in its designation as a SDT and the use of this designation as the basis of criminal liability against him in this case. In further support of his argument, Mr. Fariz relies on the additional arguments he has

[9] At this point in the proceedings, Mr. Fariz has focused on the designation of the PIJ as a SDT, and reserves the right to challenge the designation of Abd Al Aziz Awda, Fathi Shiqaqi, and Ramadan Abdullah Shallah at a later point in the proceedings. Mr. Fariz pauses to note, however, that Mr. Shiqaqi at the very least cannot challenge his own designation, since he was killed approximately ten months after his designation. *See* Doc. 636 at 74 ¶ 43(225)(A).

provided in Part II.A, *supra*. This Court should dismiss Counts 4 and 33-43 since these Counts rely on the designation of the PIJ as a SDT.

III. Because the material support counts (Counts 22-32) and money laundering counts (Counts 33-43) are multiplicitous, the government must elect between these charges to cure this defect in the Superseding Indictment.

The double jeopardy clause of the fifth amendment states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Supreme Court interprets the double jeopardy clause "'to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.'" *United States v. Moore*, 43 F.3d 568, 571 (11th Cir. 1994) (quoting *Missouri v. Hunter*, 459 U.S. 359, 365 (1983)). The double jeopardy clause protects against a "second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense." *United States. v. Boldin*, 772 F.2d 719, 725 (11th Cir. 1985) (citing *Albernaz v. United States*, 450 U.S. 333 (1981)).

A multiplicitous indictment subjects a defendant to possible violations of his rights under the double jeopardy clause which protects him against multiple punishments for the same offense. "'Multiplicity' is the charging of a single offense in more than one count." *United States v. Smith*, 231 F.3d 800, 815 (11th Cir. 2000) (quoting *United States v. Langford*, 946 F.2d 798, 802 (11th Cir. 1991)). A multiplicitous indictment creates two possible problems for a defendant. "'First, the defendant may receive multiple sentences for

the same offense. Second, a multiplicitous indictment may improperly prejudice a jury by suggesting that a defendant has committed several crimes – not one.'" *Id*.

The Supreme Court has formulated a test for determining whether a defendant is being exposed to multiple punishments for the same offense. If "'the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'" *Rutledge v. United States*, 517 U.S. 292, 297 (1996) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). The *Blockburger* test depends on the presumption that Congress generally "does not intend to punish the same offense under two different statutes." *Moore*, 43 F.3d at 571 (citing *Whalen v. United States*, 445 U.S. 161, 164 (1980)). Therefore, the *Blockburger* test is essentially a statutory interpretation analysis. *Id*. "If the statutes . . . specifically authorize cumulative punishments for the same offense, a court may impose cumulative punishment without violating the Double Jeopardy Clause." *Moore*, 43 F.3d at 571 (citing *Missouri v. Hunter*, 459 U.S. 359, 368 (1983)).[10] Multiplicity of certain counts do not require that the entire indictment be dismissed. Rather, the government must elect or consolidate the offending counts, and dismiss surplus counts.

[10]The Court in *Moore* found that a defendant may be punished separately under two statutes prohibiting the use of a firearm (car-jacking and use of a firearm in a crime of violence) even though the statutes fail the *Blockburger* test, and require the same four elements to establish a violation because one statute specifically states that it intends to punish a defendant separately ("Whoever . . . uses or carries a firearm, shall, *in addition to the punishment provided for such crime of violence or drug trafficking crime*, be sentenced to imprisonment for five years . . ." *Moore*, 43 F.3d at 574 (quoting 18 U.S.C. § 924(c)(1)) (emphasis in original)).

United States v. Universal Corp., 344 U.S. 218, 231 (1952); *United States v. Mendez*, 117 F.3d 480, 486 (11th Cir. 1997); *United States v. Smith*, 591 F.2d 1105, 1108 (5th Cir. 1978).

Mr. Fariz is charged with eleven counts of providing material support to a foreign terrorist organization, in violation of 18 U.S.C. § 2339B(a)(1) and (2). (Doc. 636 at 120 - 21). Counts 22-32 of the Superseding Indictment list eleven transactions in which Mr. Fariz allegedly transferred or caused to be transferred amounts of money to the PIJ. While the material support statute lists many other means by which a person may provide material support to a FTO, Counts 22-32 allege that Mr. Fariz provided material support to the PIJ only by way of these eleven alleged money transfers. There are no allegations in these counts that Mr. Fariz provided any other type of support.

Mr. Fariz is also charged with eleven counts of money laundering pursuant to 18 U.S.C. § 1956(a)(2)(A). (Doc. 636 at 122 - 23). Section 1956(a)(2)(A) provides:

> Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States with the intent to promote the carrying on of specified unlawful activity . . . shall be sentenced . . . .

The Superseding Indictment alleges that Mr. Fariz transferred money with the intent to carry on two specified unlawful activities: (1) providing material support to the PIJ, as defined in18 U.S.C. §2339A(b) (material support of a FTO);[11] and (2) contributing funds to the PIJ

[11]The Superseding Indictment appears to omit the statute criminalizing the alleged activity, 18 U.S.C. § 2339B. Mr. Fariz presumes that the government intended the specified unlawful activity

in violation of 18 U.S.C. §§ 1701-1706 (contributing funds to a SDT).[12] Counts 33-43 of the Superseding Indictment list the same eleven transactions as those listed in the material support counts, in which Mr. Fariz allegedly transferred or caused to be transferred amounts of money to the PIJ.

The material support charges and the money laundering charges are multiplicitous, and as such, the indictment violates Mr. Fariz's rights under the double jeopardy clause. Under this indictment, Mr. Fariz is subject to more than one prosecution and punishment for the same offense. Furthermore, the jury is likely to be prejudiced by the multiplicitous indictment by suggesting that Mr. Fariz has committed multiple crimes. The government should be required to choose which of the counts, either material support or money laundering, it intends to pursue against Mr. Fariz.

Specifically, under the *Blockburger* test, the acts required to establish a violation of the material support charges in this case are identical to the acts required to establish a violation of the money laundering charges. In each material support count, the government must prove that Mr. Fariz, as alleged, transferred money to the PIJ. (Doc. 636 at 120) (alleging that Mr. Fariz provided material support and resources "by transferring and causing to be transferred, the amount of money indicated to the PIJ in the territories of the West Bank and Gaza")). In each money laundering count, the government must prove that Mr. Fariz

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refers to Section 2339B.

[12]Counts 33-43 do not allege contributions to any other SDT otherwise named in the Superseding Indictment, namely Fathi Shiqaqi, Ramadan Abdullah Shallah or Abd Al Aziz Awda.

transferred money to the PIJ. *Id*. at 122 (alleging that Mr. Fariz transferred, attempted to transfer and caused to be transferred the same funds to the PIJ). There are no separate facts that must be proven as to one statute that will not necessarily be proven under the other statute. Therefore, the material support counts are multiplicitous to the money laundering counts. The government must elect between these charges to cure the defect in the Superseding Indictment.

IV. Pleading Error in Count Two

Count Two of the Superseding Indictment charges Mr. Fariz with conspiracy to murder, maim, or injure persons at places outside the United States in violation of 18 U.S.C. § 956(a)(1). (Doc. 636 at 101). Count Two describes the Overt Acts as:

> Within the jurisdiction of the United States, in furtherance of said conspiracy, and to effect the objects thereof, the defendants and others, known and unknown to the Grand Jury, committed the Overt Acts set forth in Part E of Count One, paragraphs 236 through 324 of this Superseding Indictment, which are fully incorporated by reference herein.

Id. at 103. Accordingly, the Superseding Indictment alleges that the Overt Acts referenced in paragraphs 236 through 324 of the Superseding Indictment occurred "within the jurisdiction of the United States." This allegation, perhaps inadvertently, is not consistent with the actual claims in the referenced paragraphs. Specifically, paragraphs 248, 279, 284, 290, 315, and 321 describe events that are alleged to have occurred within Israel. The indictment, as written, is not only inconsistent, but may be read to imply that several attacks occurred within the jurisdiction of the United States. This inconsistency is prejudicial to the

Defendants. Therefore, Mr. Fariz asks that this Court include an instruction to the jury making clear the fact that none of the alleged overt acts described in paragraphs 248, 279, 284, 290, 315, and 321 are alleged to have occurred within the jurisdiction of the United States. Alternatively, Mr. Fariz asks that the government be required to amend the Superseding Indictment to correct this inaccuracy.

V. Conclusion

Based on the foregoing, Mr. Fariz requests that this Court (1) dismiss Counts 3, 4, 12-16, and 18-43, (2) quash Paragraph 26(f) of Count One, and (3) require the correction or instruction concerning the error in Count Two of the Superseding Indictment (Doc. 636).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of November, 2004, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

/s/ M. Allison Guagliardo
M. Allison Guagliardo
Assistant Federal Public Defender